IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-734

HENRY J. VACCARO,

Petitioner,

vs.

DEPARTMENT OF LAW AND PUBLIC SAFETY
BOARD OF MEDICAL EXAMINERS,

Respondents.

On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION

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Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-5611-12

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BRIEF IN OPPOSITION

Counter-Statement of Questions Involved

1. Should a writ of certiorari be granted to review a refusal to stay administrative proceedings pending disposition of related criminal charges, where allegations of the sale of controlled dangerous substances required prompt disciplinary action in the public interest?

2. Should a writ of certiorari be granted to review a state appellate court's denial of a petitioner's motion to amend his appellate brief to raise an issue of entrapment where the issue is essentially factual and should have been raised in the administrative proceeding from which the appeal was taken?

Counter-Statement of the Case

Petitioner, Henry J. Vaccaro, M.D., was charged on November 28, 1972 by administrative complaint of the New Jersey State Board of Medical Examiners (hereinafter Board) with gross malpractice or gross neglect in the practice of Medicine which has endangered the health or life of any person. N.J.S.A. 45:9-16(h). Specifically, petitioner was charged with delivering and dispensing controlled dangerous substances with a recognized high abuse potential on 42 occasions between March 10, 1972 and November 21, 1972 to three undercover investigators from the Division of Consumer Affairs. Petitioner sought and was granted an adjournment of the scheduled December hearing date. On March 27, 1973 petitioner was indicted in a 17 count indictment.

On May 2, 1973 petitioner was notified by the Board that the hearing would take place on May 30, 1973. Petitioner then requested that the administrative hearing be postponed until the criminal trial had been concluded. The Board denied the request because of the serious threat to the public posed by a physician charged with such wanton and mercenary conduct and advised petitioner that he was not required to testify and that failure to give testimony was "not a ground upon which licensing sanctions or forfeiture may or shall be imposed." The Board met on May 30, 1973 to conduct the hearing and

petitioner again applied to the Board for a stay. The Board indicated that in light of the nature of the charges that he made dangerous drugs readily available on request, it would accept the voluntary surrender, without prejudice, of petitioner's license to practice medicine in New Jersey pending the outcome of the criminal matter. Petitioner refused, his application for a stay was denied and the hearing was conducted.

The three investigators testified at length at the hearing about the ease with which they received controlled dangerous substances from Vaccaro and his staff. One investigator testified that on her first visit she had a limited physical examination and received, on request, a prescription for Obedrin because she "needed them to keep awake." On her next visit, she was sold a "bag of amphetamines," a controlled substance with a high abuse potential. She thereafter received the "bags" either from Vaccaro or at his direction on each subsequent visit without any examination for $8.00 a "bag." The two undercover investigators testified that they were sold packets of biphetamines and prescriptions for Parest 400 and Tuinal with a similar lack of concern for the nature and clear abuse potential of the drugs. One investigator told petitioner that he wanted the drugs to keep him "high" and "awake." He was charged $8.00 for the packet of Biphetamine 20's and $5.00 for the prescription and $18.00 when he received two packages of Biphetamine 20's and a prescription for Parest 400. The other investigators' testimony confirmed the casual attitude with which petitioner sold drugs and the price which was charged.

The investigators testified that they received a combined total of 2,236 pills and capsules on 42 visits to petitioner's office. An expert, a practicing physician, also testified for the State. He testified about the unique prop-

erties of the substances offered in evidence and about the medically limited uses of such substances. The expert testified that the medically indicated uses of Biphetamine is limited to a reducing regimen, as an adjunctive form of therapy to diet—only in cases of exogenous obesity—which results from the compulsion ingestion of food, the treatment of hyperkinetic behavior in children and for the treatment of narcolepsy. The physician also testified that the amounts dispensed were in excess of a medically indicated therapeutic dosage even assuming such therapeutic regimen were justified. He further testified that the amount of Tuinal dispensed deviated substantially from the standard of practice and constituted gross malpractice in the practice of medicine which endangers the life or health of a person. The patient files in evidence showed no suggestion of any patient history of the investigators nor any indication of a physical examination being conducted.

Although petitioner chose not to testify, he consulted with counsel and counsel actively cross-examined the witnesses for the State. Petitioner limited his presentation to three character witnesses.

On June 14, 1973 the Board issued a Final Decision and Order revoking the license to practice medicine in New Jersey of Henry J. Vaccaro, M.D. The Final Decision and Order of the Board was affirmed by the Superior Court of New Jersey, Appellate Division on May 15, 1974. On September 16, 1974 the Supreme Court of New Jersey denied petitioner's petition for certification.

ARGUMENT

POINT I

The Petition for writ of certiorari should be denied since the Board of Medical Examiners properly denied the application for a stay pending disposition of related criminal charges of an administrative hearing involving the sale by a physician of controlled dangerous substances because the public interest required an early resolution of the charges.

The petitioner's request for a stay pending disposition of related charges of the administrative hearing was properly denied by the Board of Medical Examiners. Petitioner, a physician, had been charged by the Board of Medical Examiners with gross malpractice and gross neglect in the practice of medicine for illegally dispensing dangerous drugs. The administrative complaint consisted of charges that petitioner had illegally sold drugs without any medical indication or justification to three investigators. Subsequently, petitioner was indicted and the results of the investigation which was the basis for the administrative charges before the Board constituted three counts of the seventeen count indictment. The trial on the indictment resulted in a conviction of eight counts on May 8, 1974. Vaccaro was sentenced to 22 to 36 years in prison, suspended, 5 years probation and fined $40,000. The trial on the manslaughter count of the indictment which was severed from the trial is pending.

The petitioner argues that it is constitutionally impermissible to conduct an administrative hearing when criminal charges are pending concerning similar conduct as the result is to coerce him "into making a choice between the whirlpool and the rock." (Pb16-14). That con-

tention, if accepted, would grace every licensee charged with a crime affecting such licensee with an absolute

tinue in a regulated area of activity until the criminal matter is concluded. The administrative matter before the Board was grounded on 42 counts of gross malpractice and gross neglect in the practice of medicine which had endangered the health and life of the persons purportedly "treated." The exercise of discretion by the Board in denying the stay was based on a threat to the public welfare that was represented by the complaint before it. The Board's judgment was consistent with decisions by federal courts when applications have been made to stay civil actions pending the completion of related criminal proceedings and consistent with decisions by the Court.

In *Standard Sanitary Manufacturing Co.* v. *U. S.*, 226 U. S. 20 (1912), the issue of the impropriety of contemporaneous proceedings was summarily rejected:

> "The Sherman Act provides for a criminal proceeding to punish violations, and suits in equity to restrain such violations, and the suits may be brought simultaneously or successively. The order of their bringing must depend upon the government; the dependence of their trials cannot be fixed by a hard-and-fast rule, or made imperatively to turn upon the character of the suit. Circumstances may determine and are for the consideration of the court. An imperative rule that the civil suit must await the trial of the criminal action might result in injustice or take from the statute a great deal of its power. Besides a suit by the government, there may be an action for damages by a 'person injured by reason of anything forbidden by the act.' Must

> it also wait? Indeed, the reasons urged for the rule, if logically extended, would compel the post-
>
> until the exhaustion of criminal prosecutions or their expiration by lapse of time. Until either event occurs, the danger of incrimination cannot be said to have passed. It is manifest, therefore, that *the most favorable view which can be taken of the rights of defendants in such situations is that they depend upon the discretion of the court in the particular case.*" (emphasis added) Id. at 51.

Similarly, in *United States* v. *Kordel,* 397 U. S. 1 (1970), the FDA announced that a criminal proceeding would be initiated against the corporation and certain corporate employees shortly after a civil action had been filed. The corporation moved to stay the civil action until after disposition of any criminal proceeding. The district court denied the motion, interrogatories were served and answered without any corporation employee asserting his privilege against self-incrimination, and individual defendants who had answered the interrogatories were convicted on the criminal charges. This Court affirmed the convictions holding that:

> "It would stultify enforcement of federal law to require a governmental agency such as the FDA invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial." *Id.* at 11.

See also *United States* v. *Blue,* 384 U. S. 251 (1966); *United States* v. *Simon,* 373 F. 2d 649 (2nd Cir. 1967), *cert. granted,* 386 U. S. 1020 (1967), *dismissed for mootness,* 389 U. S. 425 (1967); *DeVita* v. *Sills,* 422 F. 2d 1172 (3rd Cir. 1970).

Therefore, the Board of Medical Examiner's rejection of the petitioner's contention that the Fifth Amendment privilege against self incrimination precludes the State from holding a civil disciplinary proceeding in advance of a criminal proceeding arising out of related events and relieving a person from making the decision whether to testify in the civil matter or to invoke his privilege was squarely grounded on well-established precedent and does not warrant review by this Court.

POINT II

The Court should not grant a writ of certiorari to review the state court's denial of the petitioner's motion to supplement a brief on appeal, because his entrapment defense was essentially factual and therefore should have been raised at the Administrative Hearing.

The refusal of the Appellate Division to permit the petitioner to file a supplemental brief raising the defense of entrapment also does not present a question warranting review by this Court. It is a general rule of appellate practice that ordinarily no issue will be considered by the reviewing court unless raised and argued below. *Fortunato* v. *Ford Motor Co.*, 464 F. 2d 922 (2nd Cir. 1972) *cert. den.* 409 U. S. 1038 (1972); *Deerfield Estates, Inc.* v. *Twp. of East Brunswick*, 60 N. J. 115 (1972). Furthermore, entrapment obviously is a defense which should have been raised in a timely fashion before the administrative agency, since it would be necessary to hear proofs on the claim. Therefore, the grant of the motion to raise this issue for the first time while the case was pending on appeal probably would have required a remand.

In any event, the record which was developed at the hearing unequivocally demonstrates that entrapment as defined by *Sorrells* v. *U. S.*, 287 U. S. 435 (1932) and *Sherman* v. *U. S.*, 356 U. S. 369 (1952), did not occur. No testimony was elicited which even remotely implied that the criminal design originated in the minds of the investigators and that they implanted in the mind of an innocent person the disposition to commit the offense and induced the commission of the offense. The investigators merely appeared at the office of the petitioner, requested the dangerous drugs and gave a non-medical reason for such request. The petitioner was merely afforded the opportunity to sell controlled substances to the investigators. He did not examine the investigators, he did not cause any diagnosis to be made and he freely sold the dangerous drugs at his established prices. Entrapment did not exist.

Further, there is no indication in *Sorrells* and *Sherman, supra,* that the defense of entrapment is of constitutional dimensions; rather, both of those cases considered the defense in the context of the Court's supervisory power over the administration of justice within the federal system.

Finally, it should be noted that since petitioner now has been convicted of violations of a law relating to narcotic drugs, the provisions of N.J.S.A. 45:9-16, which provide for mandatory suspension or revocation upon conviction of a crime relating to narcotic drugs, would now come into play. Therefore, even if petitioner raised questions worthy of this Court's consideration, the question of his right to practice medicine would be moot.

CONCLUSION

It is respectfully submitted that for the foregoing reasons, the petition for a writ of certiorari should be denied.

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